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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 347

EDWARD BLACKMAN,
Petitioner,

vs.

BALABAN & KATZ CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

EDWARD BLACKMAN, *Pro Se,*
33 N. La Salle Street,
Chicago 2, Illinois,
Petitioner.

THE LAKESIDE-DONNELLEY PRINTING COMPANY, CHICAGO

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BALABAN & KATZ CORPORATION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Edward Blackman, petitions this court to issue a writ of certiorari to review a judgment (Appendix B, p. 13, *infra*) entered by the United States Court of Appeals for the Seventh Circuit on May 11, 1955, affirming a judgment (Tr. 142-143) entered by the United States District Court for the Northern District of Illinois, Eastern Division, the Honorable William J. Campbell, Judge presiding, dismissing, without trial, a counterclaim filed by Petitioner as being insufficient as a matter of law.

OPINIONS BELOW.

The unreported memorandum opinion of the District Court is printed in the Transcript at pages 120 to 140, the relevant part being on p. 123. The opinion of the Court of Appeals, printed as Appendix A, p. 9, *infra*, is reported in 222 F. (2d) at page 54.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 11, 1955 (Appendix B, p. 13, *infra*). Rehearing was denied on June 10, 1955 (Appendix C, p. 14, *infra*). This Court has jurisdiction under 28 U. S. C., Section 1254(1).

THE QUESTIONS PRESENTED.

The following questions are presented by this petition:

1. May an attorney who has a written contract with his client to receive 25% of any amount recovered by his client in certain litigation be deprived of his percentage of the recovery by defendants paying a large part of the sum recovered to creditors of his client for the client's benefit without paying any part thereof to the attorney?

2. Does it not constitute the deprivation of property without due process of law to deny a trial to an attorney who alleges that his rights under a written contract to receive 25% of any sum recovered by his client in certain litigation are being violated by payment of a substantial portion of the recovery to creditors of the client for the client's benefit without payment to him?

3. Does it not constitute a deprivation of property without due process of law to deny a trial to an attorney who alleges that his right to receive 25% of any sum recovered by his client in certain litigation is being violated, and that he is being defrauded, by his client and its adversaries agreeing to pay a large portion of the sum recovered to various creditors of his client in cancellation of the client's indebtedness to them, and that this method of payment is being used for the express purpose of avoiding the attorney's contract and preventing him from recovering 25% of the sum so paid?

CONSTITUTIONAL PROVISION INVOLVED.

This cause involves the Fifth Amendment to the Constitution of the United States which reads:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of* life, liberty, or *property, without due process of law;* nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE.

32 West Randolph Corporation, the owner of a multi-story building housing a large Chicago downtown theatre, employed the petitioner, Edward Blackman, a member of the bar of this Court, pursuant to a written contract dated March 14, 1949, to prepare and file an action for treble damages under the Sherman and Clayton Acts, 15 U. S. C. Sections 1 *et seq.* on its behalf against certain motion picture distributors and exhibitors in Chicago (the other respondents herein) (Exhibit A, Tr. 54). Pursuant to said employment contract, petitioner was to receive for his services, an amount equal to 25% of anything recovered by 32 West Randolph Corporation (Ex. A, Tr. 54-55). Thereafter, Edward Blackman filed such an action for treble damages on behalf of 32 West Randolph Corporation against the other respondents herein in the United States District Court for the Northern District of Illinois (Tr. 6). On February 7, 1951, 32 West Randolph Corporation discharged Edward Blackman as its attorney (Exhibit G, Tr. 64) and since said date has had three other firms of

attorneys representing it in this litigation (Par. 8, Tr. 50; Tr. 66-67; Tr. 144).

On March 17, 1954, 32 West Randolph Corporation filed a petition for an immediate determination of what fee, if any, was payable to petitioner for his services out of the pending settlement of the litigation, alleging that petitioner was discharged for cause (Tr. 84 to 89). Petitioner filed an answer denying any cause for his discharge (Tr. 97-104) and also filed this counterclaim in which he alleged that the motion picture defendants had agreed to pay 32 West Randolph Corporation in excess of $1,100,000 in settlement of the main case. However, instead of paying said sum directly to 32 West Randolph Corporation, it is alleged that a large part of said sum was being paid to creditors of 32 West Randolph Corporation in cancellation of certain indebtedness of 32 West Randolph Corporation. It is alleged that this money was being paid in that manner for the purpose of defrauding petitioner and preventing him from recovering 25% of said sum pursuant to his contract (Tr. 104 to 109). The trial Judge entered a judgment dismissing the counterclaim as legally insufficient (Tr. 142-143), without any hearing (Tr. 123), and the Court of Appeals affirmed. (Appendix A, pp. 11-12, *infra*; Appendix B, p. 13, *infra*).

Pursuant to the petition of 32 West Randolph Corporation, the answer of Edward Blackman, and exhibits and affidavits filed by both parties, the trial court found that 32 West Randolph Corporation did not allege just cause for the discharge of petitioner (Tr. 132-140) and entered a judgment that petitioner was entitled to 25% of any amount paid by the motion picture defendants directly to 32 West Randolph Corporation (Tr. 142-143). The Court of Appeals reversed this judgment and and ordered a trial on the issues created by the petition and answer (Appen-

dix A, pp. 9-12, *infra*). The Court of Appeals did this although it simultaneously affirmed the dismissal of petitioner's counterclaim.

The District Court entertained jurisdiction pursuant to the provisions of 28 U. S. C. 1337 because the case arose under the Anti-trust Laws of the United States, 15 U. S. C. 1-27.

REASONS FOR GRANTING THE WRIT.

1. The issues raised by this appeal are unique. It long has been held that all contracting parties are equal, unless incompetent to contract by reason of age, relationship, etc. Now the Court below has decided erroneously that there is one exception to this rule—that the contractual rights of an attorney with his client for his fee are on an inferior level and will not be protected or enforced by the United States Courts. The District Court said (Tr. 115):

> "Therefore, even if this Court should hold that Mr. Blackman's fee is measured by a percentage of the settlement, he too is in no position to claim that any settlement is unwise or unfair or *even fraudulent.*"

By affirming the dismissal of the counterclaim, the Court of Appeals apparently accepted this view of the District Court. This is quite contrary to the law in other jurisdictions including the decision of the Court of Appeals for the District of Columbia in *Kellogg* v. *Winchell*, 273 Fed. 745 (1921). It is also contrary to the *rationale* of the Court of Appeals for the Second Circuit in *Woodbury* v. *Andrew Jergens Co.*, 69 F. (2d) 49 (1934), which held that an attorney hired on a contingent fee contract had an equitable assignment of the cause of action *pro tanto*. Obviously then he could complain were he fraudulently deprived of his interest.

2. The decision also conflicts with the *rationale* of that

of the Supreme Court of Illinois in *Smith* v. *Young*, 62 Ill. 210 (1871) and *Lewis* v. *Braun*, 356 Ill. 467, 191 N. E. 56 (1934), and that of the Appellate Court of Illinois in *Hawk* v. *Ament*, 28 Ill. App. 390 (1888) all of which held that an attorney employed by a contingent fee contract is an equitable assignee of part of the cause of action and has rights which will be recognized and protected by the Courts.

3. It is contrary to the *rationale* of the decision of this Court in *Barnes* v. *Alexander*, 232 U. S. 117, 58 L. Ed. 530 (1914), where this Court held that an attorney hired by a contingent fee contract had a right to prosecute the case to a final determination so he could earn the fee provided by the contract.

4. This decision also results in petitioner, a member of the bar of this Court, being deprived of his property without due process of law, contrary to the Fifth Amendment, by denying him a trial on his counterclaim. The counterclaim alleges that petitioner's contractual rights to receive 25% of any sum recovered by his client in certain litigation are being violated, and that he is being defrauded; that this is being done by his client, the plaintiff, and defendants agreeing that a substantial part of the sum for which the litigation is being settled, would be paid to various creditors of the client in cancellation of the client's indebtedness to such creditors, instead of directly to the client. It is charged that this was done for the express purpose of avoiding paying to the attorney, pursuant to his contract with the client, 25% of the amount so paid to such creditors of the client. Due process of law signifies a right to be heard. *Hovey* v. *Elliott*, 167 U. S. 409, 413-419, 42 L. Ed. 215, 219-221 (1897). The Court of Appeals in its opinion recognized that 32 West Randolph Corporation had a written contract with Petitioner which provided that

he be paid 25% of anything recovered by 32 West Randolph Corporation. Petitioner seeks an accounting under this agreement. He alleges in his counterclaim that 32 West Randolph Corporation is recovering several times as much indirectly through payments to its creditors in cancellation of its indebtedness to them, as it admits to recovering directly. To deny Petitioner a hearing on this allegation is a denial of due process of law. *Morgan* v. *United States*, 298 U. S. 468, 80 L. Ed. 1288 (1936); *See: Mullane* v. *Central Hanover Bank & Trust Company*, 339 U. S. 306, 313, 94 L. Ed. 865, 872-873 (1950).

5. The decision of the Court of Appeals is contrary to the law generally. As stated in 4 Williston on Contracts (Rev. Ed., 1936) 2871 (Sec. 1029):

> "It has been decided in a few jurisdictions, led by New York, that a different rule prevails between attorney and client from that ordinarily applicable to employer and employee—that the client may break a contract to employ an attorney for a fixed service without other liability than to pay for services previously rendered. Such a rule has been justly criticized. * * * It is a fundamental principle of bilateral contracts that both parties must be bound by the agreement. * * * The decision in question would make the contracts of attorney and client voidable at the option of the client. It is doubtful whether public policy demands the extension of such an anomaly. The attorney has no peculiar advantage in the formation of the agreement, since the client, unlike the infant, is presumably competent to contract; the fiduciary relation arises afterward. * * * such a right would enable the client unjustifiably to deprive the attorney of the benefits of the contract except as to a right of restitution, though the services were substantially complete. * * * the attorney should be allowed to recover for breach of the contract. The weight of authority is to this effect, and opposed to the New York view."

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD BLACKMAN, *pro se*,
of Chicago, Illinois,
Petitioner.

August 22, 1955.

APPENDIX A.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

October Term, 1954, January Session, 1955.

No. 11270.
32 WEST RANDOLPH CORPORATION,
Plaintiff-Appellant,
vs.
EDWARD BLACKMAN,
Defendant-Appellee.

No. 11279.
EDWARD BLACKMAN,
Appellant,
vs.
BALABAN & KATZ CORP., ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

May 11, 1955.

Before DUFFY, *Chief Judge,* FINNEGAN and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Two separate appeals from a single final order, entered below July 2, 1954, are considered in this opinion. We are asked by 32 West Randolph Corporation, appellant in number 11270, to review part of that order holding Blackman's attorney's lien valid, and ruling appellant's petition insufficient. Blackman, on the

other hand, rests his appeal, numbered 11279, on a phase of that same order dismissing his cross and counterclaim. Facts relevant to this opinion follow.

Blackman, a member of the Illinois bar, was employed by 32 West Randolph Corporation, which we will refer to as the "client," to institute anti-trust proceedings against Balaban & Katz Corporation and various other principal, major producers and distributors of motion pictures. By letter, dated March 14, 1949, that client confirmed oral arrangements with attorney Blackman, agreeing to compensate him in ". . . an amount equal to twenty-five per cent (25%) of anything paid . . . (client) . . . or recovered by . . . (client) . . . from any of the defendants (ed: itemized in this communication) . . ." This contingent agreement was again acknowledged by letter dated August 4, 1949. Twenty-one days later Blackman informed his client that he filed a complaint bottomed on alleged anti-trust law violations. Essaness Theaters Corporation and some of its associated and subsidiary companies were joined as plaintiffs, in this suit by Blackman along with his client. On February 7, 1951, Blackman's client instructed him to dismiss that action and render a bill for his services; twelve days later the same request was repeated. On or about March 1, 1951, Blackman asserted his Illinois statutory attorney's lien by serving appropriate notice on the various corporate parties-defendant to the anti-trust law complaint.

In early March, 1954, the client filed a petition, below, "for an immediate determination of what amount, if anything, is or shall be payable by it to Edward Blackman as attorney's fees . . ." attaching in support, as exhibits, various communications from its attorney, Blackman. The answer interposed, to that petition, recites several defenses and presents cross and counterclaims by Blackman. His

client filed a reply to its attorney's answer to their counterclaim and an answer to the cross and counterclaim. We think all litigants involved have unduly labored and magnified the basic issues between them. Stripped of its legalistic trappings this is simply an instance where a client discharged an attorney retained on a contingent fee contract. The client alleges misconduct on behalf of its attorney as the basis for terminating the relationship. Virtually all the facts and correspondence between the parties are admitted. An actual relevant issue alleging misconduct stemming from purported representation of conflicting interests was unqualifiedly denied by Blackman.

Charges of unethical conduct permeate these proceedings and dominate all briefs as though this were a grievance committee hearing of a bar association instead of litigation in Federal Courts. When lawyers accuse one another of unethical practices the entire bar suffers. We think some modicum of circumspection by *all* members of bar involved, respecting the alleged ethical aspects of this case, would be far more becoming to the legal profession. Because of the determination made in this opinion our views as to whether any ethical provisions have been breached remains unexpressed. For we reverse and remand case number 11270 to the District Court with directions to hear and take evidence upon issues framed by such pleadings as are remaining after our affirmance herein of the district judge's dismissal of the cross claim and counterclaim filed by Blackman and also now before us on appeal in case number 11279.

We leave the judgment, entered July 2, 1954 in number 11270, undisturbed because no reversible error is present and among other things, we are satisfied that an attorney's statutory lien in Illinois does not constitute a roving commission of the magnitude envisaged by and in Blackman's

cross and counterclaim, *Standidge* v. *Chicago Railways Co.*, 254 Ill. 524, 98 N. E. 963 (1912), *Berkemeier* v. *Dormuralt Motor Sales*, 263 Ill. App. 211, 218 (1931).

Judgment in case number 11270 is reversed and remanded with directions, and judgment in number 11279 is affirmed.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Wednesday, May 11, 1955.

Before

Hon. F. RYAN DUFFY, *Chief Judge.*
Hon. PHILIP J. FINNEGAN, *Circuit Judge.*
Hon. H. NATHAN SWAIM, *Circuit Judge.*

EDWARD BLACKMAN, *Appellant,*
vs.
No. 11279.
BALABAN & KATZ CORP., ET AL., *Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs.

APPENDIX C.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Friday, June 10, 1955.

Before

Hon. F. RYAN DUFFY, *Chief Judge.*
Hon. PHILIP J. FINNEGAN, *Circuit Judge.*
Hon. H. NATHAN SWAIM, *Circuit Judge.*

32 WEST RANDOLPH CORPORATION,
Plaintiff-Appellant,
No. 11270. *vs.*
EDWARD BLACKMAN,
Defendant-Appellee.

EDWARD BLACKMAN,
Appellant,
No. 11279. *vs.*
BALABAN & KATZ CORPORATION, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of these causes be, and the same are hereby, DENIED.

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OCTOBER TERM, 1955.

No. 347

EDWARD BLACKMAN,

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Respondents.

BRIEF AND ARGUMENT OF RESPONDENT 32 WEST RANDOLPH CORPORATION TO PETITION OF EDWARD BLACKMAN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF AND ARGUMENT OF RESPONDENT 32 WEST RANDOLPH CORPORATION TO PETITION OF EDWARD BLACKMAN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent, 32 West Randolph Corporation, the petitioner in the case of which these proceedings are a part, opposes the granting of a writ of certiorari in this matter; and in support of such opposition we respectfully submit the following Brief and Argument in its behalf:

A.

POINTS AND AUTHORITIES.

I. This case presents no important question within the meaning of Rule 19 of this Court.

See argument.

II. Even if the order of the District Court and the decision of the Court of Appeals were erroneous, they do not, as claimed by petitioner, constitute deprivation of property without due process in violation of the Fifth Amendment of the United States Constitution.

Corrigan v. *Buckley*, 271 U.S. 323, 332 (1926).

Jones v. *Buffalo Creek Coal & Coke Co.*, 245 U.S. 328, 329 (1917).

III. The sufficiency of the "Cross-claim and Counterclaim" was determinable under Illinois law; and the order of the District Court and the decision of the Court of Appeals are consistent with, and not in conflict with, the applicable law of that State.

Roe v. *Sears, Roebuck & Co.*, 132 F. 2d 829, 831 (C.C.A. 7th C. 1943).

Great Lakes Transit Corporation v. *Marceau*, 154 F. 2d 623, 625-626 (C.C.A. 2d C. 1946).

Spellman v. *Bankers' Trust Co.*, 6 F. 2d 799 (C.C.A. 2d C. 1925).

Cameron v. *Boeger*, 200 Ill. 84, 90, 91-92 (1902).

Standidge v. *Chicago Railways Co.*, 254 Ill. 524, 535 (1912).

Sutton v. *Chicago Railways Co.*, 258 Ill. 551, 553 (1913).

Baker v. *Baker*, 258 Ill. 418, 420-421 (1913).

Scott v. *New York, C. & St. L. R. Co.*, 159 F. 2d. 618, 620-621 (C.C.A. 7th C. 1947).

IV. The decision of the Court of Appeals is not in conflict with any decision of any other Court of Appeals, or with any decision of this Court.

See argument.

B.

ARGUMENT.

I. This case presents no important question within the meaning of Rule 19 of this Court.

The issues in this proceeding concern a controversy between a lawyer and his client respecting the interpretation and effect of a particular employment contract. The sole question is whether the Court of Appeals erred in affirming an order of the District Court which held legally insufficient a "Cross-claim and Counterclaim" filed by petitioner (Tr. 104-109) and dismissed the pleading (Tr. 123, 143). The order appealed from, based as it is upon the particular allegations of the pleading, and the particular contract, has no general importance or significance whatever warranting consideration of the case by this Court.

II. Even if the order of the District Court and the decision of the Court of Appeals were erroneous, they do not, as claimed by petitioner, constitute deprivation of property without due process in violation of the Fifth Amendment of the United States Constitution.

The entry of such an order, even if it be erroneous, does not constitute deprivation of property without due process within the meaning of the Amendment.

> *Corrigan* v. *Buckley,* 271 U.S. 323, 332 (1926).
> *Jones* v. *Buffalo Creek Coal & Coke Co.,* 245 U.S. 328, 329 (1917).

The *Hovey* v. *Elliott, Morgan* v. *United States,* and *Mullane* v. *Central Hanover Bank & Trust Company* cases, cited on pages 6 and 7 of the petition, are too obviously irrelevant to require comment.

On page 4 of the petition it is stated that the District Court order was entered without any hearing; and Tr. 123 is cited. As a matter of fact the order was entered after a hearing set for the sole purpose of declaring petitioner's asserted rights (Tr. 114). At this hearing petitioner was present (Tr. 120). At the hearing the Court heard arguments of counsel, and petitioner had an opportunity to participate in the argument but remained silent (Tr. 119-140). The District Court had, prior to this hearing, heard counsel on the issues presented by the pleadings at a pretrial conference, at which petitioner was present (Tr. 109-115). The order specifically recites that it is entered upon the pleadings and after hearing arguments of counsel on the legal sufficiency of the pleadings (Tr. 142). On his appeal petitioner had opportunity to be heard, and was fully heard by the Court of Appeals (App. B and App. C to the petition, pp. 13, 14).

III. The sufficiency of the "Cross-claim and Counterclaim" was determinable under Illinois law; and the order of the District Court and the decision of the Court of Appeals are consistent with, and not in conflict with, the applicable law of that State.

The legal sufficiency of the "Cross-claim and Counterclaim" was determinable under the law of Illinois.

Roe v. *Sears, Roebuck & Co.*, 132 F. 2d 829, 831 (C.C.A. 7th C. 1943).

Great Lakes Transit Corporation v. *Marceau*, 154 F. 2d 623, 625-626 (C.C.A. 2d C. 1946).

Spellman v. *Bankers' Trust Co.*, 6 F. 2d 799 (C.C.A. 2d C. 1925).

The order of the District Court and the decision of the Court of Appeals were both consistent with the law of that State. The determinative question was whether the

contract gave petitioner such an interest in this respondent's claim that he had a right to thwart a pending negotiation for settlement. The answer to this question is clearly negative under the law of Illinois. Under the Illinois common law a contingent fee contract, as such, does not constitute an assignment to the attorney of any interest in the claim prosecuted by him under the contract; and such a contract does not prevent the client from dismissing or settling the case without the attorney's knowledge or approval, or give the attorney any right to prevent or object to the settlement or dismissal of the suit.

Cameron v. *Boeger,* 200 Ill. 84, 90, 91-92 (1902).

The enactment by the Illinois Legislature, in 1909, of the so-called Attorney's Lien Act, referred to in petitioner's "Cross-claim and Counterclaim" (Tr. 106; Ill. Rev. Stat. 1953, St. Bar Assoc. Ed., vol. 1, p. 193, C. 13, § 14) did not in any way qualify the client's right to settle the case.

Standidge v. *Chicago Railways Co.*, 254 Ill. 524, 535 (1912).

Sutton v. *Chicago Railways Co.*, 258 Ill. 551, 553 (1913).

The lien under that statute attaches only to a verdict, judgment or decree entered in the case, or to money or property recovered—that is to say, only upon the proceeds of the litigation or settlement of the claim.

Baker v. *Baker,* 258 Ill. 418, 420-421 (1913).

Scott v. *New York, C. & St. L. R. Co.*, 159 F. 2d 618, 620-621 (C.C.A. 7th C. 1947).

The cases of *Smith* v. *Young,* 62 Ill. 210, *Lewis* v. *Braun,* 356 Ill. 467, and *Hawk* v. *Ament,* 28 Ill. App. 390, cited on page 6 of the petition, are not to the contrary. Each

of these cases dealt with a particular contract; and the opinion in each case demonstrates that the court construed the contract before it as being something more than a mere contingent fee contract. In the *Smith* case the court construed the contract as effecting an equitable lien (62 Ill. 211). In the *Lewis* case the court construed the contract as constituting a power of attorney coupled with an interest in the claim (356 Ill. 470). In the *Hawk* case the court construed the agreement as creating an equitable assignment (28 Ill. App. 394). The *Lewis* case was decided in 1934. Four years previously, in 1930, the same contract was before the Circuit Court of Appeals for the Seventh Circuit in the case of *Lewis* v. *Canadian Pacific Railway Co.*, reported in 39 F. 2d 834. In connection with the point we make, it is interesting to note that the Circuit Court of Appeals construed the contract in quite a different way from the construction later reached by the Supreme Court of Illinois in the *Lewis* v. *Braun* case, considering it merely as a typical contingent fee agreement; and on this construction reached the conclusion that the agreement did not constitute an assignment of any interest in the claim because there was nothing in it specifically to that effect (39 F. 2d 838). Thus both of the *Lewis* decisions support the principle of Illinois law that a contingent fee contract alone does not effect an assignment.

Obviously, in the agreement before the Court in the present case, there was no provision that it should constitute an assignment. Therefore, petitioner had, and has, no interest in the claim of this respondent against the defendants.

IV. The decision of the Court of Appeals is not in conflict with any decision of any other Court of Appeals, or with any decision of this Court.

On pages 5 and 6 of his petition petitioner cites *Kellogg* v. *Winchell*, 273 Fed. 745, *Woodbury* v. *Andrew Jergens Co.*, 69 F. 2d 49, and *Barnes* v. *Alexander*, 232 U.S. 117, as inconsistent with the decision of the Court of Appeals in the present case. None of them is inconsistent or even relevant, since none of them involved the law of Illinois. The *Kellogg* case dealt with the law of the District of Columbia; the *Woodbury* case was specifically decided under a statute of New York State; and the *Barnes* case involved the law of the Territory of Arizona.

Nor is it true that the issues raised by this appeal are unique, as asserted on page 5 of the petition. It is there argued that the decision of the Court of Appeals in effect holds that the contractual rights of an attorney with his client for his fee "are on an inferior level and will not be protected or enforced by the United States Courts." The petition then quotes the District Judge, with the implication that he stated that there was no remedy in his court for an unwise, unfair or "even fraudulent" settlement. No such implication is warranted. Petitioner fails to distinguish between the two issues which were before the District Court: (a) how much, if any, compensation was due petitioner? and (b) could petitioner block the contemplated settlement and thereby collect a percentage on payments made to other persons in compromise of their own claims against the defendants? Only the latter question is involved in this proceeding, and the decision of the lower court on this question was correct under the law of the State of Illinois as declared by its Supreme Court in the cases we have cited.

CONCLUSION.

We therefore urge that the petition states no ground for the issuance of a writ of certiorari, and that the prayer for the writ should be denied.

Respectfully submitted,

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Attorneys for
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Respondent.

Office - Supreme Court, U.
FILED
SEP 24 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 347

EDWARD BLACKMAN,
Cross-Plaintiff and Petitioner,

vs.

BALABAN & KATZ CORPORATION, *et al.*,
Cross-Defendants and Respondents.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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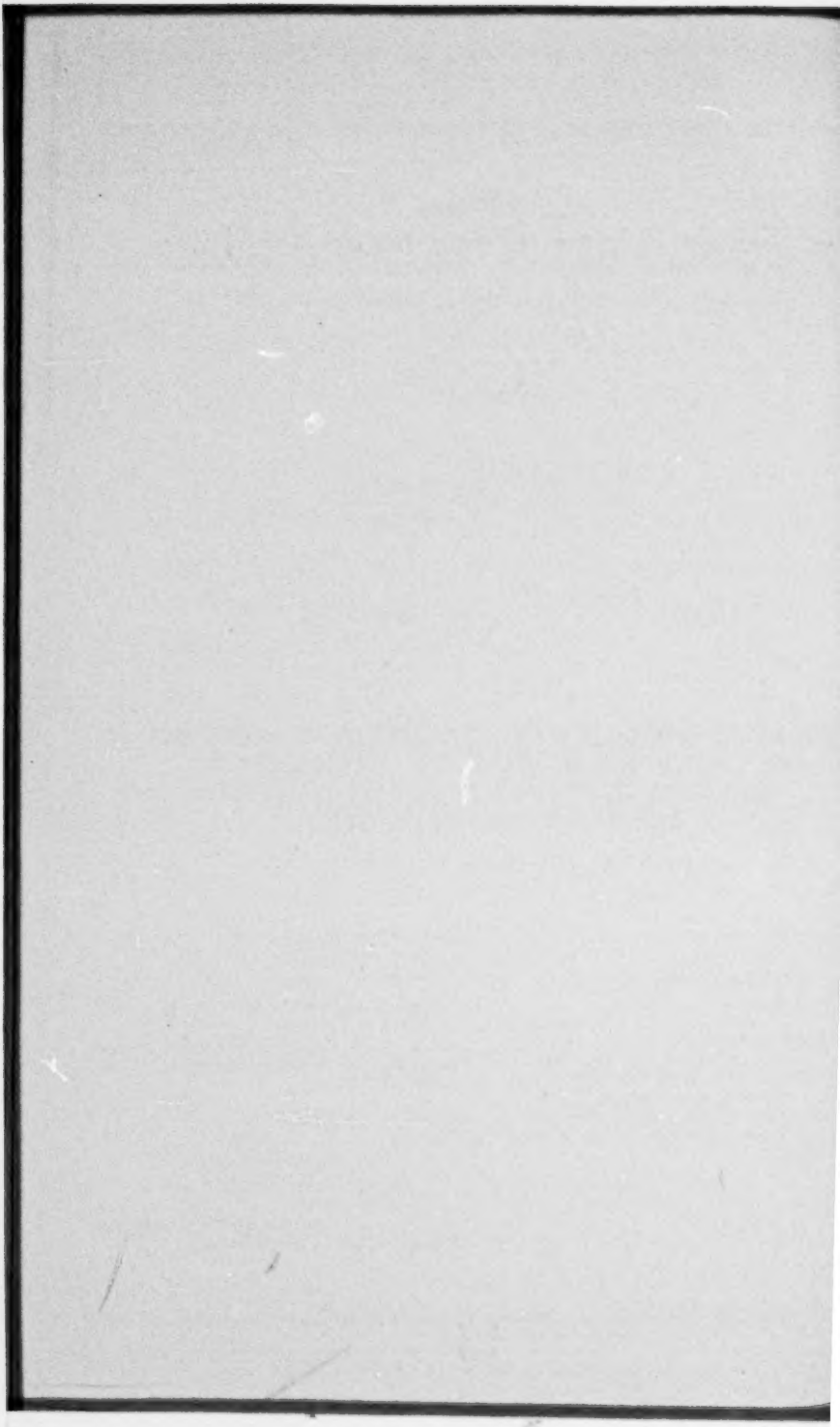

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BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

On August 25, 1949, petitioner, Attorney Edward Blackman, filed suit in the name of and on behalf of respondent 32 West Randolph Corporation against all the other respondents for damages under the anti-trust laws in the United States District Court for the Northern District of Illinois, Eastern Division (Cause No. 49 C 1315). (R.

139, 69.) Petitioner was employed by 32 West Randolph Corporation pursuant to a contingent fee contract which provided in substance that petitioner was to receive 25% of anything recovered by 32 West Randolph Corporation. (R. 54, 90.)

Several other claimants also brought actions or asserted claims against the same defendants for damages under the anti-trust laws. These claims were not joint and did not assert any common interest in a common fund or *res*. All the actions were completely independent suits brought directly against the common defendants. The defendants have been successfully negotiating settlements with these other claimants. (R. 44-5, 70, 71, 76, 107, 108.)

On February 17, 1951, 32 West Randolph Corporation discharged petitioner Blackman as its attorney, allegedly for good cause (R. 139, 84-89). Shortly thereafter, each of the defendants in cause number 49 C 1315 was served by petitioner with a notice of Attorney's Lien pursuant to Sec. 14, Chapter 13 of the Illinois Revised Statutes (1953 Ed.). (R. 61.) On March 17, 1954, respondent 32 West Randolph Corporation filed a petition in the District Court for a determination of what fees, if any, were due petitioner for his services to 32 West Randolph Corporation. (R. 71-72.)

Petitioner Blackman filed an answer to this petitioner and a "cross-claim and counterclaim" which alleged that petitioner was the equitable owner of a part of the action of 32 West Randolph Corporation against the defendants by virtue of the Illinois Attorney's Lien Law. (R. 97, 104.) Said "cross-claim and counterclaim" prayed for relief in the form of (1) judicial permission to block any settlement his former client might make with defendants and to block settlement proceedings between defendants and the aforesaid plaintiffs in the other causes who had not retained petitioner (R. 108); and (2) judicial permission to become a

plaintiff in the action and bring the treble damage case filed by him on behalf of respondent 32 West Randolph Corporation to immediate trial even though his former client was unwilling to go through a trial of the action (R. 106, 108).

Petitioner's "cross-claim and counterclaim" was dismissed as a matter of law and the dismissal was affirmed by the Court of Appeals. *Blackman* v. *Balaban & Katz Corporation, et al.*, 222 F. 2d 54 (CA 7, 1955).

ARGUMENT.

I. THE CONSTITUTIONALITY OF THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S CROSS-CLAIM AND COUNTERCLAIM WAS NOT RAISED IN THE COURT BELOW AND CANNOT BE CONSIDERED HERE.

The only question which petitioner now seeks to have reviewed is the propriety of the District Court's dismissal of his "cross-claim and counterclaim" without a full trial. For the obvious purpose of inducing this Court to grant a writ of certiorari, petitioner has phrased this question in terms of constitutional due process under the Fifth Amendment of the Constitution of the United States.

In the first place, a mere construction of a contract or of a state statute by a court is not a denial of due process. Secondly, regardless of the merits and demerits of this question, the constitutionality of the District Court's dismissal of petitioner's pleading was not raised in the lower courts and, under settled law, cannot be raised for the first time in this Court. *Shelley* v. *Kraemer,* 334 U.S. 1, 92 L.Ed. 1161 (1948); *United States* v. *New York Tele Co.,* 336 U.S. 637, 90 L.Ed 371 (1946); *Duignan* v. *United States,* 274 U.S. 197, 71 L.Ed. 996 (1927).

II. THE QUESTION PETITIONER RAISES INVOLVES THE INTERPRETATION OF SETTLED ILLINOIS LAW WHICH THE LOWER COURTS WERE ABLE TO INTERPRET AND APPLY.

When stripped of its improper constitutional allegations, the petition for writ of certiorari raises the sole question of whether the Illinois Attorney's Lien Law gives petitioner the right to the extraordinary relief he demands in his "cross-claim and counterclaim." We will not burden the

Court with extensive citations and discussion of this question of state law. Suffice it to say that the issue was fully briefed and argued before a District Court Judge and three Court of Appeals Judges with long experience in interpreting the laws of the State of Illinois. In each instance, the question was decided against petitioner. Under the established policy of this Court, great deference is given their holding on a question of state law and the judgment below should be left undisturbed. *Spiegel's Estate* v. *Commissioner of Internal Revenue,* 335 U.S. 701 (1949); *Helvering* v. *Stuart,* 317 U.S. 154 (1942); *McGregor* v. *State Mutual Life Insurance Co.,* 315 U.S. 380 (1942).

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari in this case should be denied.

Respectfully submitted,

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